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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 342

VINCENT A. PALISI,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT SIDNEY JOHNSTON, JR.
Suite 3-5, Schwan Building
Biloxi, Mississippi
Attorney for Petitioner

E. L. MERDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals entered April 2, 1965, is reported at 342 F.2d 799. See Appendix A. The opinion of the District Court entered March 2, 1964, is reported at 226 F. Supp. 651. See Appendix B.

JURISDICTION

1. The judgment of the Court of Appeals was entered on April 2, 1965. See Appendix C.

2. This Court's order dated July 2, 1965, extended the time within which to file a petition for certiorari to July 12, 1965.

3. The jurisdiction of the court is invoked under 28 U. S. Code § 1254(1).

QUESTIONS PRESENTED

1. Whether a state or federal standard determines sufficiency of the evidence to support a jury verdict in a diversity case.

2. Whether proof of the violation of a statute accompanied by proof of injury which the legislature sought to prevent poses a jury question.

3. Whether state statute controls substantive question of liability in federal diversity action arising out of accident occurring in Mississippi wherein liability is asserted on basis of Mississippi statute.

4. Whether state law should be looked to and applied on question of sufficiency of evidence to permit jury to find facts essential to liability, in diversity case, wherein liability is based on state statute.

5. Whether proof of essential fact may be made by circumstantial evidence.

6. Whether proof of the violation of a state statute, together with happening of injury intended to be pre-

vented by such statute, constitutes sufficient evidence to pose jury question.

7. Whether two distinct acts of negligence by two different actors may both be regarded as proximate causes of an injury if both operate concurrently, and both cooperate to produce the injury.

8. Whether the violation of a statute, amounting to negligence per se, which concurs with the negligence of a third person to cause an injury, can be a proximate cause of such injury even though the two causes act independently, and one or the other may not be the sole proximate cause of such injury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. United States Constitution:

(1) Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

II. Mississippi Code 1942, Recompiled:

(1) Section 1741. Injury to persons or property by railroads, prima facie evidence of want of skill. See Appendix D.

(2) Section 7775. Railroads to erect signboards. See Appendix E.

(3) Section 7776. Driver of motor vehicle to stop before crossing railroad track. See Appendix F.

STATEMENT OF THE CASE

This wrongful death action was tried to a jury in a federal district court in Mississippi, after removal from state court. The case originated from a collision between defendant's freight train and an automobile in which the deceased was riding as a passenger. Petitioner, the plaintiff below, was the father of the boy killed by the aforementioned train. In his complaint he alleged negligence on the part of defendant railroad which proximately caused the collision and resultant death of his minor son (R. 116-122). The answer of defendant railroad denied negligence (R. 132), and affirmatively alleged that the deceased was guilty of contributory negligence which proximately contributed to cause the collision and his injuries and death (R. 134).

Petitioner originally sued the driver of said automobile in addition to the railroad. On a covenant not to sue, he was paid $17,500.00 by the parents of said driver. Upon trial of the remaining cause of action against the railroad the jury, having been advised of the prior settlement (R. 400), returned a verdict in favor of petitioner in the sum of $20,000.00 (R. 147).

When petitioner rested, defendant railroad moved for a directed verdict, but the trial judge said there was substantial evidence in the record requiring submission of the case to the jury, and that the evidence was sufficient to support a verdict (R. 282-283). On renewal of this motion at the conclusion of all the evidence, the court again overruled the defendant and submitted the case to the jury (R. 430). A verdict was returned in the amount of $20,000.00. Defendant then moved for judgment notwith-

standing the verdict, and said motion was sustained (R. 167).

The evidence shows that Phillip Palisi, age 16, was killed at a public railroad crossing in Biloxi, Harrison County, Mississippi, by an eastbound Louisville & Nashville diesel-engined freight at approximately 4:30 A.M., May 7, 1961 (R. 140). The crossing was located at St. Peters Street just outside Gate No. 6, Keesler Air Force Base, Biloxi, Mississippi (See photographs, R. 107-111).

The deceased and Jeanne LeCourt, age 15, both of Louisiana, had driven a friend, Roger Alverson, who was stationed at Keesler Air Force Base, to the base and were returning to the LeCourt summer cottage at Waveland, Mississippi. They were making their exit from the base at Gate No. 6 (R. 230-231). At the time of the accident the automobile was driven by Jeanne LeCourt, although Phillip had driven to the base a few minutes earlier, while Jeanne was in the rear seat asleep (R. 258-259).

Just prior to leaving the base Jeanne LeCourt drove eastward in the south lane of a divided roadway along the north side of a steel mesh fence. This roadway ran parallel to the Louisville & Nashville Railroad right of way which was immediately south of the fence. Miss LeCourt drove eastward along this fence for approximately a city block to St. Peters Street where she turned south at the gate in the normal manner for traffic leaving the base (R. 107, 108, 231-232, 260).

For approximately seventeen months prior to the accident there was an Air Police Guard Shack on the west side of St. Peters Street and just inside Gate No. 6 (R. 198-199). This shack, together with the steel mesh fence and several utility poles, obscured the MISSISSIPPI LAW STOP sign for motorists approaching the crossing from the

west as did Jeanne LeCourt. The crossing sign was required by Mississippi law to warn motorists of the railroad track located just south of Gate No. 6 on St. Peters Street, but it did not face the direction from which such motorists would approach the crossing. The track itself was elevated from the street level at the gate (Plaintiff's Exhibit 2, a photograph of the scene, R. 104). Testimony of witnesses, in addition to the photographic evidence, demonstrated that the railroad warning sign was obscured for eastbound traffic approaching the crossing in the manner Jeanne LeCourt did before this accident (R. 58-59, 104, 196-197, 202, 208, 232-234, 375-380). The sign was less than thirty-five feet from the track (R. 62, 199, 200).

Miss LeCourt did not hear any train signals nor see any lights as she made her approach to the gate and the crossing (R. 238); she did not hear the train approach from her right rear (R. 238-239); and did not see the railroad warning sign (R. 232-234); her hearing and vision were good (R. 241-242). She had never driven over this crossing before (R. 240), and was not aware that the road along the wire mesh fence ran parallel to the track (R. 260), nor that she was driving toward the track when she made her turn (R. 262). At the time of the accident she was traveling some 10 to 12 miles per hour (R. 60, 261); and thought the guard at the gate was waving goodbye as she and the deceased started out the gate (R. 244, 261-262). She recalled that Roger Alverson had waved to the guard as Phillip drove on the base, and the guard waved back (R. 258). At the time of the accident Phillip was sitting in the passenger seat leaning against the door and facing front (R. 396); Phillip had driven to the base earlier and was tired at this early morning hour (R. 259).

The negligence relied upon by petitioner was the railroad's failure to meet the statutory burden imposed by

the legislature of the State of Mississippi to warn the approaching motorist of the existence of its track crossing a public thoroughfare. The respondent railroad violated the statute in two ways: (1) It permitted the warning sign to be obstructed for approximately seventeen months prior to this accident; and (2) it failed to place the required sign a minimum of fifty feet from the crossing in such manner as to provide appropriate warning to the approaching motorists. The photographic evidence together with the testimony of witnesses demonstrates that the sign was obscured, and therefore of no value as a warning. This evidence also proves that the sign was ineffective as a warning to motorists approaching the crossing from the west.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, and said there was no substantial evidence that any negligence of the railroad was the proximate cause of the collision and death of Phillip Palisi.

Petitioner now seeks certiorari and presents for review the ruling of the Fifth Circuit, since that court has obviously applied an erroneous standard in judging the sufficiency of the evidence to support the verdict of the jury below.

REASONS FOR GRANTING THE WRIT

I. Federal or State Standard to Test Sufficiency of Evidence in Diversity Case.

Here, just as in Mercer v. Theriot,[1] *there is raised the question whether a federal or state test must be applied in diversity cases to determine the sufficiency of the evidence to sustain a jury verdict.*

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1. 377 U.S. 152, 84 S.Ct. 1157, 12 L.ed.2d 206.

a. Federal Test Applied

The trial court in its written opinion, allowed that this was a diversity case, "which must be tried as if this were another Mississippi Court." The court nevertheless applied the Fifth Circuit rule of *Johnson* v. *Buckley*, 317 F.2d 644, and granted respondent railroad's Rule 50(b) motion in the face of evidence which a Mississippi court would certainly have considered sufficient to sustain the jury verdict on the issue of proximate cause. *Green* v. *Gulf, Mobile & Ohio Railroad Co.*, 244 Miss. 211, 141 So.2d 216; *Marx* v. *Berry*, 176 Miss. 1, 168 So. 61; *Solomon et al.* v. *Continental Baking Co.*, 160 So. 732; *Gulf Refining Co.* v. *Brown*, 196 Miss. 131, 16 So.2d 765; cf. *Ries* v. *Sanders*, 34 F.R.D. 468, D.C. Miss.

The Court of Appeals for the Fifth Circuit affirmed in a *per curiam* opinion in which it merely cited *Turner* v. *Atlantic Coast Line Railroad Co.*, 292 F.2d 586, and *Hogan* v. *U. S.*, 325 F.2d 276, and said there was no substantial evidence that any negligence on the part of the railroad was the proximate cause of the death in question. In upholding the trial court in this case the Fifth Circuit is aligned with those Circuits which apply the so-called "Federal" as opposed to the "state" rule on sufficiency of the evidence in diversity cases. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.ed.2d 935; and compare *Gilreath* v. *Southern Railway Co. et al.*, 323 F.2d 158 (C.A. 6, 1963).

This being a diversity case respondent was permitted to remove it from the state court where it was originally filed. In the state court petitioner would have obtained a trial by court and jury according to state law, both as to the elements of his cause of action, and under the state test of the sufficiency of the evidence. May a non-resident defendant obtain trial of plaintiff's state created cause of action (wrongful death) under different rules of law merely by removing such action to a federal court? And, too, may

such non-resident defendant defeat a plaintiff's constitutional right to trial by jury by resort to the so-called "federal" rule in these removal causes? It is submitted that the question posed by this petition is now ripe for decision by this Court.

b. State Standard Appropriate

Petitioner reasons that the state rule should be applied in such diversity cases in order to do complete justice to persons situated as was the petitioner below. In all cases where the federal rule cannot possibly benefit such litigants he argues that the state rule should be applied so as to safeguard their right to jury trial under the Seventh Amendment.

Why is this case particularly appropriate for the application of the state standard? Aside from the fact that petitioner's action was removed from state court where petitioner would have been afforded a jury trial on the issue of negligence and proximate cause, on the basis of applicable state law, this is a case where the negligence of the railroad is predicated upon the violation of a statute, *i. e.* negligence per se. But there are no federal laws the violation of which constitutes negligence per se;[2] therefore, in order that substantial justice may be done in cases of this kind the state standard must be applied.

Violation of a statute amounts to negligence per se. If it be shown that the very injury occurred which the legislature sought to prevent, then there is sufficient evidence of proximate cause to go to the jury on this issue. Here the purpose of § 7775, the "Mississippi Law Stop" statute (See Appendix E), was to warn motorists of the presence of the track so that they could and would stop; and having

2. At least none which would be applicable in diversity cases.

stopped, they could and would then look and listen for approaching trains. This law is designed to prevent crossing accidents. Here because of the failure of the railroad to comply with the requirement of the legislature, no warning of the presence of the track was provided, with the resultant crossing accident. It is clear that under these circumstances there was sufficient evidence of proximate cause to submit the issue to the jury.

The violation of this statute, while not making out a case of absolute liability against respondent railroad company, posed a jury question under all the evidence whether or not such violation was a proximate cause of the death of Phillip Palisi. *Solomon* v. *Continental Baking Co.*, 172 Miss. 388, 160 So. 732; *Gulf Refining Co.* v. *Brown*, 196 Miss. 131, 16 So.2d 765.

The statutory warning sign is particularly necessary when, as here, the motorist is a stranger to the community, and is not familiar with the crossing. The reason for the warning is stated by the legislature as follows: "(T)o insure warning of the proximity of the crossing, and notice to stop * * *." The further necessity of a visible warning sign is made apparent when the evidence is examined in detail. Not only was Jeanne LeCourt a stranger to the crossing, but she drove one block on a road which ran parallel to the track, with no sign in view. She made her right turn around the guard shack, which obstructed her view of the sign, and had less than 50 feet to drive to the crossing, in this early pre-dawn hour when her lights and any fixed lights in the area were rendered ineffective by the breaking of the new day; and also when any lights of the approaching train would likewise be rendered ineffectual. Had she been given the required warning of the proximity of this crossing, she would have had notice to stop, and then to look and listen. It is obvious that with just such a warning, this accident would never have hap-

pened at all. The undisputed evidence is that her speed was a mere 10 to 12 miles per hour. There is not the slightest suggestion from this speed that she was trying to beat the train.

In this state of the record, the jury was warranted in believing that the negligence of respondent railroad was the sole proximate cause of the death of petitioner's intestate. Surely on the whole record if the negligence of respondent railroad combined with the negligence of Jeanne LeCourt as a contributing proximate cause to produce this crossing collision, it is obvious that the verdict of the jury was proper.

II. The Decision Is Contrary to State Law.

The decision below encroaches upon the rights of resident plaintiffs in diversity actions. It ignores state statutes and is in conflict with applicable decisions of the Mississippi Supreme Court construing those statutes.

a. The Evidence

The evidence posed a jury question which required submission of the case. The undisputed evidence proves that the warning sign installed by respondent at the crossing did not comply with the applicable Mississippi statute. § 7775, Mississippi Code of 1942, Recompiled. Jeanne LeCourt, driver of the automobile in which Phillip Palisi was killed, was a stranger to the area and was unfamiliar with the crossing; she had never driven over it before, and did not know the track was there. She was unaware that respondent's train was approaching the crossing from her right rear as she drove east along the fence. Her speed was only ten to twelve miles per hour. The guard at the gate was more of a distraction than a help under the circumstances. Jeanne LeCourt thought he was waving to her as she was leaving the base, just as

he and Roger had exchanged waves when they arrived at the base earlier.

From the slow speed of only ten to twelve miles per hour the jury could readily conclude that no attempt was being made to beat the train to the crossing. It was also reasonable for the jury to accept the testimony of Jeanne LeCourt that she did not know she was driving along the track, or that the train was approaching, or that she was going toward the track when she turned onto St. Peters Street at the gate.

Jeanne LeCourt did not see the Mississippi Law Stop sign at any time as she approached this crossing. In fact this sign could not be seen by her on her approach, since it was obscured by the guard shack.

The jury found that the negligence of respondent railroad was a proximate cause of the injury and death of Phillip Palisi. There being evidence to sustain that finding, it was error for the trial court to set aside the verdict; this error was continued by the Court of Appeals when it affirmed the judgment appealed from.

b. Presumption of Fault

Since it was shown beyond conjecture that the death of Palisi was caused by the running of respondent's train, there arose a statutory presumption that the injury was the result of respondent's negligence. § 1741, Mississippi Code of 1942, Recompiled (See Appendix D). This presumption could only be rebutted by clear proof by the respondent of facts exonerating it from blame. *New Orleans & N. E. R. Co.* v. *Brooks*, 85 Miss. 269, 38 So. 40.

As stated by the Supreme Court of Mississippi in the *Brooks* case:

> "This statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must

> be clearly shown, and the facts so proven must exonerate the company from blame. * * * It may well be that the jury doubted or rejected the testimony (of respondent's witnesses), as it was in their province to do, and decided that appellant (railroad) had not established its freedom from negligence. This consideration is likewise sufficient to sustain the finding of the jury." 38 So. 40, 41.

The opinion of the District Judge demonstrates his resort to conjecture and surmise when he suggests that the accident would have happened with or without the requisite warning sign, and whether it was properly placed or not, 226 F. Supp. 651, 653.

In *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 927, this Court, in referring to the effect of presumptions, said:

> "Under the Erie rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial (citing cases)."

In the instant case petitioner made out a prima facie case of liability to be determined by the jury. Respondent railroad failed to rebut the presumption and the jury found for petitioner. The jury verdict should have been permitted to stand.

c. Mississippi Decision

The Mississippi rule on submissibility of an issue to the jury is that when reasonable minds might differ on the matter, questions of proximate cause, negligence and contributory negligence are generally for the determination of the jury. *American Creosote Works of La.* v. *Harp*, 215 Miss. 5, 60 So.2d 514, 35 A.L.R.2d 603.

The judgment of the court below is also contrary to *Russell* v. *Williams*, 168 Miss. 181, 150 So. 528, where the

court held that if the occurrence of an intervening cause might reasonably have been anticipated it will not interrupt the connection between the original cause and the injury. Here the trial court held the negligence of Jeanne LeCourt was the sole proximate cause of the death of Palisi. Her negligence, if any, was at most an intervening cause which might reasonably have been anticipated by the respondent railroad. The stated purpose of the legislature was to give warning of the crossing, and notice to stop, look and listen, and thus avoid collision with trains at railroad crossings. See § 7775, Code of 1942, Recompiled.

The decision appealed from is also contrary to *Magers* v. *Okolona, Houston & Calhoun City R. Co.*, 174 Miss. 860, 165 So. 416, holding that where reasonable men might have a difference of opinion as to whether the negligence of the actor continued as a substantial factor in bringing about the injury, the question of plaintiff's recovery is for the jury. The failure of the respondent to comply with the crossing sign statute could easily have been found by the jury to have continued as a substantial factor in bringing about the death of Palisi.

Jeanne LeCourt testified she did not know she had been driving along a railroad track, did not know she was approaching a railroad crossing, and did not know the train was "there". She said she did not see any warning sign, and was therefore not apprised of her approach to the railroad crossing. The rule is expressed in Mississippi as follows:

> "If a defendant is negligent and this negligence combined with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence, without such other independent intervening cause, would

not have produced the injury." See *Permenter* v. *Milner Chevrolet Co.*, 229 Miss. 385, 91 So.2d 243, 253.

It was contended in *Solomon* v. *Continental Baking Co.*, 172 Miss. 388, 160 So. 732, that the negligence of the motorist in driving his vehicle was the sole proximate cause of the collision. There the driver of a truck stopped his car on the side of the highway at night when it was not equipped with a rear red light as required by statute, and a motorist ran into the truck and sustained injuries. The Court said:

> "One of the purposes of the statute requiring an automobile to be equipped with a rear red light is to prevent collisions of the character here, and the driver of an automobile violating this statute should realize the probability that one driving another automobile would approach him from the rear without himself observing the requirement of the 'law of the road.'"

So in the instant case, when the respondent railroad violated the warning sign statute it should have realized the probability that a motorist might approach the St. Peters Street crossing without observing the requirements of the law of the road. Of course, without the proper warning of the existence of the crossing, a stranger to the area might well be on the track before he or she knew it was there.

Another statute which bears consideration in the determination of this cause is § 7776 of the Mississippi Code of 1942, Recompiled (Appendix F). This statute requires the driver of a motor vehicle to stop before going upon a railroad crossing. But Jeanne LeCourt could not violate § 7776 since she did not know the track was there, was a stranger to the area, and was not provided the requisite statutory warning sign by the respondent railroad. It is significant that the statute leaves for the jury the ques-

tion of whether such driver's violation of its provisions was the sole or proximate cause of the collision.

Assuming for the sake of argument that the District Court is correct when he says the evidence shows negligence on the part of Jeanne LeCourt, such negligence would be an intervening cause which respondent railroad should reasonably have anticipated. Under the circumstances such intervening cause would not interrupt the causal connection between the negligence of the railroad and the death of Phillip Palisi. Such intervening cause would not insulate the railroad from liability in this cause. The negligence of both the railroad and Jeanne LeCourt would be concurrent, and each would be joint tortfeasors. *McCorkle* v. *United Gas Pipe Line Company et al.*, May 24, 1965, 175 So.2d 480, involving violations of Mississippi statutes, as negligence per se.

See also *United Gas Corporation* v. *Parker*, 174 So.2d 370, to the effect that there may be more than one proximate cause of an injury, and if a defendant's negligence proximately contributed to such injury he is liable, the Mississippi Supreme Court said, even though his negligence was not the sole proximate cause of the injury. Here, just as in the Parker case the jury manifestly rejected respondent railroad's contention that the death of Phillip Palisi was a result of the sole negligence of Jeanne LeCourt.

The rule appropriate to petitioner's case is succinctly treated and covered in 44 Am. Jur. 772 *et seq.*, dealing with Railroads—Warning Signs, Section 528.

Although there were at a crossing two different signs, one on each side of the tracks and both conforming to statutory requirements, the particular circumstances, viz: an arrangement of advertising signs that tended to interfere with clear vision (the Guard shack in Palisi), were

regarded as warranting a submission to the jury on the question whether ordinary care or reasonable prudence required the defendant to erect and maintain other and more conspicuous signs at such crossing, in *St. Louis-San Francisco R. Co.* v. *Pringe*, 145 Okla. 194, 291 Pac. 973, 71 A.L.R. 356.

In the case of *Stangeis* v. *Pontiac, O. & N. R. Co.*, 266 Mich. 224, 253 N.W. 276, 93 A.L.R. 215, the court held that the question of whether the failure to comply with statutory requirements as to signs was the proximate cause of the injury was generally a question of fact for the jury.

In the *Stephenson* v. *Grand Trunk Western R. Co.* case, 110 F.2d 401, 132 A.L.R. 455, writ of cert. dismissed in 311 U.S. 720, 85 L.Ed. 469, 60 S.Ct. 1106, the Seventh Circuit held the evidence was inconsistent with defendant's theory that the decedent had warning that he was approaching a crossing, and said: "Without minimizing what often has been said regarding the duty of a person approaching a railroad crossing, to employ all of his senses for the purpose of ascertaining whether or not it is safe to cross, we do not believe such duty exists until he has knowledge, or by the exercise of reasonable care, should have had knowledge that there is, in fact, a crossing. Otherwise, a person traveling upon a highway would be under a continuous duty to look and listen for a train regardless of where he was with reference to a railroad crossing. * * *."

That it is the duty of a railroad to give appropriate warning of a crossing, there can be no doubt. The manner in which that duty shall be discharged varies according to the circumstances and surroundings, and ordinarily is a question for the jury, said this Court in *Grand Trunk Railway Co. of Canada* v. *Ives*, 144 U.S. 408, 420, 12 S.Ct. 679, 36 L.Ed. 485.

The above authorities point unerringly to the fact that the questions posed for decision by this record were for the jury. The jury having decided them in favor of petitioner, the judgment of the lower courts should be vacated and the verdict of the jury reinstated.

III. The Decision Conflicts with Decisions of Other Circuits and Vitally Affects Litigants in Diversity Cases.

The decision of the Court of Appeals for the Fifth Circuit, affirming the judgment n. o. v. of the District Court, is contrary to, and in conflict with, decisions of other circuits.

The Sixth Circuit, in *Hamilton Foundry & Mach. Co.* v. *International Molders and Foundry Workers Union of North America,* 1952, 193 F.2d 209, held that in considering a motion for a judgment notwithstanding the verdict the court is not free to weigh the evidence. The Third Circuit, as appears in *Kimmel* v. *Yankee Lines, Inc.*, 224 F.2d 644, is aligned with the Sixth Circuit.

The District Judge, in *Palisi* v. *Louisville & Nashville Railroad Company,* 226 F. Supp. 651, said the testimony of petitioner's witnesses, and particularly Jeanne LeCourt, was unworthy of credit, and in affirming the District Judge, the Fifth Circuit went contrary to *Thieman* v. *Johnston,* 8 Cir. 1958, 257 F.2d 129, where the Rule announced in 49 C.J.S., Judgments, § 60, pp. 166-167, is adhered to by the Eighth Circuit. This rule is tersely stated to be that such motions present only a question of law as to whether or not, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the party against whom the motion is directed, there is a total failure or lack of evidence to prove any necessary element of his case; and all reasonable

doubts must be resolved in favor of the verdict. Continuing, the rule is: "* * * in passing on the motion, the trial court may not weigh all the evidence of both sides or judge of the credibility of the witnesses, as it may do on a motion for a new trial * * *." See *Ries* v. *Sanders*, 34 F.R.D. 468 (1964). See also *City of Jackson, Mississippi*, v. *Reed*, 233 Miss. 280, 102 So.2d 342, holding that interpretation of physical circumstances of a case is the function of the jury, and that all conflicts in evidence, credibility of witnesses, etc., are within province of jury in the trial court.

CONCLUSION

For the reasons stated, this Court should summarily reverse the decision of the Court below. Summary reversal is appropriate in this case. It is consistent with this Court's practice in other cases where the law is settled by prior decisions, and also where the action of the lower court was clearly erroneous as being contrary to the state statutory and decisional rule demonstrated by the authorities cited herein.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21728

VINCENT A. PALISI,

Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(April 2, 1965.)

Before WOODBURY,* WISDOM, and BELL, Circuit Judges.

PER CURIAM: The District Court did not err in rendering judgment under Rule 50(b), F. R. Civ. P., for defendant railroad company notwithstanding the jury verdict for plaintiff. Applying the test which controls in directing a verdict so as to cast the evidence in the light most favorable to plaintiff, see *Turner* v. *Atlantic Coast Line Railroad Company*, 5 Cir., 1961, 292 F.2d 586; *Hogan* v. *United States*, 5 Cir., 1963, 325 F.2d 276, we conclude that there was no substantial evidence that any negligence on the part of the railroad company was the proximate cause of the death in question, and for that reason plaintiff was not entitled to have his case submitted to the jury.

AFFIRMED.

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*Of the First Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action Number 2676(S)(C)

VINCENT A. PALISI,
PLAINTIFF,

V.

LOUISVILLE & NASHVILLE RAILROAD CO., INC.,
DEFENDANT.

Phillip Palisi (age 16) was killed at a public crossing by the east bound Louisville & Nashville Railroad freight train, about 4:30 A.M., May 7, 1961. A jury awarded the plaintiff a verdict for twenty thousand dollars. This suit was brought under the Mississippi Wrongful Death Statute to recover from the railroad for the fatal injury on this occasion of the son of the plaintiff. This train was drawn by a diesel locomotive on this occasion and was operating at about twenty-five miles per hour as it crossed St. Peter's Street at Gate No. 6 on Keesler Air Force Base in Biloxi, Mississippi. The railroad requested a preemptory instruction under Rule 50 at the conclusion of the evidence, and action thereon was deferred by the Court to await the verdict of the jury; whereupon the defendant has timely moved under that rule for a judgment notwithstanding the verdict, or in the alternative, for a new trial.

The facts in this case are without substantial dispute. Phillip Palisi was a house guest of Jeanne LeCourt (age 14). Both of them lived in a suburb of New Orleans. The LeCourts had a cottage at Waveland where the deceased was visiting. About 6:30 P.M., on May 6, these young

people persuaded Roger Alverson, an airman stationed at Keesler Field and a friend of the deceased, to spend the evening with them at the LeCourt home. About 4:00 A.M., Roger became dissatisfied and requested that he be taken back to Keesler Field. The deceased and Jeanne LeCourt drove Roger in the LeCourt car to the air base with the decedent driving. When Roger got out of the car at Keesler, Jeanne LeCourt got in the driver's seat, and the decedent moved to the position beside her on the front seat. Thus the parties traveled through the base enroute home a few hundred yards in a southerly direction to a street which paralleled the railroad tracks, and which had a steel mesh fence constructed along the side thereof as the boundary of the air base at that point. The parties then drove easterly along that street about a city block to St. Peter's Street which crossed this railroad track at Gate No. 6 in a southerly direction. At the point of this intersection of this street with St. Peter's Street there was erected at Christmas time of 1959 a very small guard shack off the right-of-way for the protection of the air guard at this gate. This shack obscured the Mississippi stop sign on the east side of St. Peter's Street to some extent from view at one angle thereto when proceeding easterly and turning south at that point. This statutory sign was taller than the shack, and was probably twenty feet or more south thereof.

On this occasion under these circumstances this train (with its stationary head light burning, its wigwag light operating, with its bell ringing, and air horn blowing for this crossing) was approaching said crossing, while this automobile driven by Jeanne LeCourt, with some of the windows down, drove along this street parallel to said track just ahead of said train. This railroad crossing was well lighted by flood lights on the north and south side thereof. The crossing was slightly elevated on the northern approach thereto, and was slightly depressed on the south side.

Jeanne LeCourt turned south on St. Peter's Street at Gate No. 6, operating the automobile at about ten or twelve miles per hour. She did not stop at this crossing as required by state law. She said that she could not see the stop sign, and thus did not know of the existence of this railroad in that vicinity with which she was not very well acquainted, but she had driven over this crossing through Gate No. 6, five or six times within the past few days prior to this accident. As this automobile approached this railroad crossing, with the train coming east, an air police dressed in military uniform and wearing a white hat, and standing in the middle of St. Peter's Street, signaled Jeanne LeCourt to stop her car, but she pulled the automobile slightly to the east of the police, and passed him, and was immediately struck by the train. The air policeman raised his right open hand forward, and thus standing in the middle of St. Peter's Street, ordered this automobile to stop, but his signal order was ignored, and he was obliged to step aside (westerly) to avoid being hit by the automobile. Jeanne LeCourt saw the sign, but said she thought he was waving at her as a greeting, though he was a stranger.

The position and height of the statutory stop sign, and the size of the guard house did not obstruct the sign from view of the operator of this vehicle, except probably for the short interval of time when she was immediately north of this little six or eight foot shack, just before she turned her automobile south on St. Peter's Street. At all other times this sign was in plain view for anybody to see. Although the radio on this car was operating in a low tone, the sounds and warnings emanating from this train at this time in the last darkness of the morning, were present for anyone with normal sensibilities to hear and see.

A railroad is not an insurer of the absolute safety of a crossing under all circumstances and conditions. The presence of the air police in the center of this street where he did everything proper and necessary to have warned the driver of this car to stop, far more than compensated for the presence of the guard house on the premises which obscured the vision of the stop sign of the railroad for a moment to a motorist in the street and due north of said shack. One witness estimated the speed of this train at forty miles per hour, but his vantage point made that estimate somewhat of a reckless guess. The Mississippi Speed Statute (1942 Code §7782), however, has no application to the speed of this diesel drawn train. Neither does the Mississippi Bell and Whistle Statute (1942 Code §7777) have any application thereto. *Stapleton* v. *L&NRR Co.*, (5CA) 265 F.2d 738.

There was no substantial evidence in this case to contradict the undisputed evidence of the railroad that everything possible was done which could have been done after seeing that this automobile was not going to stop for this crossing, to stop this train to avoid the tragedy if possible. So that, there was no substantial evidence for a jury to ponder upon as to the Last Clear Chance Doctrine. *ICRR* v. *Underwood*, 235 F.2d 868.

The sole negligence of the railroad relied upon by the plaintiff was as to its failure to *maintain* said statutory sign so as to warn motorists of the presence of said railroad tracks. The implication inherent in such defense is the supposition that if this statutory sign had not been thus obstructed from her vision for a fractional part of a second, that she would have seen it during such interval of time, although she did not see it during the vastly greater period of time when it was in full view. It taxes the credulity of any reasonable person in honest quest of

the truth to believe such an incredible statement under the circumstances in this case, particularly when this motorist would not even be stopped by a command of the air police. This circumstance brings in to play the principal announced in *NO&NERR Co.* v. *Burge,* 2 So.2d (Miss) 825, where the Court said: "And an actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been guilty of the particular negligence charged. 2 Restatement, Torts, §432." The Court in that case further significantly said: "To say on the record in the present case that had the required signals been given the injury would not have occurred is to invoke a possibility, or conjecture; and it is not within the legitimate province, or power of a jury to convert a possibility into something more by the mere force of a verdict. *Teche Lines, Inc.* v. *Bounds,* 179 So. (Miss) 747." That is exactly what happened in this case, under the guise of fact-finding, this jury has pretended to see and find some nonexistent negligence on the part of this railroad by the impermissible use of mere surmises, and conjectures about this stop sign which are simply not supported by any substantial evidence in this record.

All questions of negligence by statute in Mississippi are made jury questions. Even though this is a diversity case which must be tried as if this were another Mississippi Court, still, a Federal Court has the inherent power to pass upon the quantity and quality of proof necessary to make out a case for submission to a jury. *Johnson* v. *Buckley,* (5CA) 317 F.2d 644.

It is the carefully considered judgment of this Court, that the plaintiff's evidence of negligence of the railroad in this case is too tenuous to constitute such substantial evidence as to warrant submission of the case by the

Court to a jury. The scintilla of evidence rule is not in effect in the Federal Court, or in a Mississippi Court. The verdict of the jury is simply without substantial support in this record. The decedent undeniably met his death solely as a proximate result of the gross negligence of Jeanne LeCourt. Accordingly, the motion of the defendant for a judgment notwithstanding the verdict of the jury will be sustained, and the former verdict and consequent judgment will be vacated, and its motion for a new trial will be overruled.

An order accordingly may be presented for entry.

s/ Harold Cox
United States District Judge

March 2, 1964

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21728

D. C. Docket No. 2676-Civil

VINCENT A. PALISI,

Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, INC.,

Appellee.

Appeal from the United States District Court for Southern District of Mississippi.

Before WOODBURY,* WISDOM, and BELL, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Vincent A. Palisi, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 2, 1965

Issued as Mandate: June 9, 1965.

*Of the First Circuit, sitting by designation.

APPENDIX D

Mississippi Code 1942, Recompiled

§ 1741. Injury to persons or property by railroads, prima facie evidence of want of skill.

In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships and individuals.

APPENDIX E

Mississippi Code 1942, Recompiled

§ 7775. Railroads to erect signboards.

Every railroad corporation or company or person or persons operating or controlling any railroad track intersecting a public road or street at grade crossings shall erect and maintain a signboard on each side of the railroad track not less than ten feet from the ground to the top of said sign on the right side of the road, forty inches by fifty inches, fifty feet from said crossing, which shall be painted with red lettering to insure warning of the proxi-

mity of the crossing, and notice to stop said vehicles, with the following:

MISSISSIPPI LAW. STOP.

Provided, that such warning at street grade crossing shall be placed at such points as the municipal authorities may designate.

APPENDIX F

Mississippi Code 1942, Recompiled

§ 7776. Driver of motor vehicle to stop before crossing railroad track.

It shall be unlawful for any person to drive or propel any automobile or automobile truck or other motor driven vehicle upon any railroad track at a public highway or municipal street intersecting such railroad at grade crossing without first stopping at a distance of not less than ten feet nor more than fifty feet from the nearest track and looking for train; provided, however, that this shall not apply to automobiles or other motor driven vehicles of any municipality, when responding to any alarm of fire, nor to the automobiles or other motor driven vehicles of the police department when responding to any emergency call, nor to motor driven ambulances when responding to an emergency call, and it shall not apply where crossing are provided with flagmen and a signal to proceed has been given by the flagman, or where gates are provided and the gates open. And in the trial of all actions to recover personal injury or property damages, sustained by any driver of such motor driven vehicles for collision of said vehicle and train in which action it may appear that the said driver may have violated any of the provisions hereof, the question of whether

or not the said violation was the sole or approximate cause of the accident and injury shall be for the jury to determine. The violation of this section shall not of itself defeat recovery and the question of negligence or the violation aforesaid shall be left to the jury: and the comparative negligence statutes and prima facie statute of this state shall apply in these cases as in other cases of negligence.

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NO. 342

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

VINCENT A. PALISI

Petitioner

V.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

A. F. LANKFORD, III
622 First National Bank Building
Mobile, Alabama
Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 342

VINCENT A. PALISI
Petitioner

V.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

See page 1 of the petition.

JURISDICTION

See page 2 of the petition.

STATUTES AND REGULATIONS INVOLVED

The statutes enumerated in the petition at page 3 and in the appendix at pages A9 and A10, were considered by the trial and appellate Courts in determining their ultimate conclusions and do not appear to respondent to be a matter of contest as to this petition nor directly involved in its ultimate determination.

QUESTIONS PRESENTED

Petitioner's eight questions (petition pages 2 and 3) do not appear to Respondent to properly raise the ultimate point required for decision by this petition. Contrary to the opinion of Petitioner, the trial and appellate courts did apply local laws in determining the issues and the weight and sufficiency of the evidence. They both agreed in the result. The sole question raised here is one of the weight and sufficiency of the evidence only.

STATEMENT OF THE CASE

So much of Petitioner's statement of the case, commencing on page 4 and going through the last full paragraph thereof on page 5, is generally correct, save the averment that Miss LeCourt drove her automobile in a normal manner for traffic leaving the base. This simply is not so. [The air patrolman on duty at the gate testified that she nearly ran him down, came up in the wrong lane and refused to stop on his or the train's signal (R-358, 361)]. The remaining references to the record and evidence omit material considerations which Respondent feels obligated to note.

On the morning preceding the accident, the decedent, Jeanne LeCourt and LeCourt's thirteen (13) year old sister left Waveland, Mississippi, in the LeCourt automobile to go to Keesler Field some thirty (30) miles distant, to pick up Roger Alverson, an airman stationed at the base, who was to be the younger LeCourt's escort (R-226-228). Contrary to that stated by Petitioner that the driver and the deceased were unfamiliar with the area where the accident occurred, the testimony showed that the party entered Keesler Field in the morning, through Gate 1, which necessitated crossing the L. & N. railroad tracks (R-245). After obtaining information as to the location of Alverson they drove out Gate 1 again over the tracks, thence westward by and parallel to the tracks until they came to Gate 6 (R-246), where they again crossed the L. & N. tracks and re-entered the

Field. After discovering that Alverson was not ready to leave, they left the field going out again over the tracks through Gate 6 (R-249). Subsequently, they returned to Keesler again entering through Gate 6 and over the tracks (R-249). After finding Alverson this time, they again left the base, leaving through Gate 6, and over the tracks, returning to Waveland (R-250). Later during the day there was additional traveling about and general consumption of gin and beer (R-252, 253 and R-271). The party ultimately returned to the Waveland home of the LeCourts at about 1:00 A.M. on the morning of the accident (R-254). They continued to party (R-255) until about 2:30 A.M. when Alverson insisted on being taken back to the base (R-256). The deceased and Alverson were to spend the night at the LeCourts, but Alverson would have none of it and even though the deceased had put on his pajamas, he finally agreed with Jeanne LeCourt, driver, to return Alverson to Keesler Field. This was about 3:00 A.M. (R-257).

The deceased drove the automobile to Keesler (R-258) entering through Gate 6 over the same tracks. After depositing Alverson (and contrary to the averment of the declaration [R-116-122]), the deceased told the driver, Jeanne LeCourt, that he was tired and asked her to drive him home (R-259). Also, contrary to the allegations of the declaration (R-116-117-122) the deceased directed the driver's route to Gate 6 (R-259). On turning to cross the L. & N. tracks at Gate 6 where the accident occurred, the driver was crossing the tracks for the sixth time that day. The photographic evidence introduced in the trial below (Defendant's Exhibits 2, 3, 4, 6, 8 and 10) graphically represented the view that one would have of the guard shack, the guard, the railroad track and the railroad track signs, as well as the open and unobstructed view of an approaching train.

There is no question of subsequent negligence in the operation of the train (R-285, 286, 287, 288). The speed of the locomotive was approximately 30 miles an hour (R-293). The right of way was one hundred feet wide

at this point (R-304-306). A general lookout was kept; the whistle was blown; the bell rung, and the crossing well lighted (R-290).

Airman Thomas M. Porter, stationed at Keesler Field, was standing at the crossing and observed the collision. He saw that the automobile nearly ran down the guard who attempted to flag her as she passed through Gate 6, and saw that the car continued over the crossing without ever stopping (R-21, R-42, R-109, R-46). Airman Porter further testified that as the automobile approached toward the crossing down the four lane street that runs parallel with the tracks, it was in the wrong lane for traffic and was in an almost dead heat with the train for about one block, both running in the same direction (R-57, 58).

Air policeman, Bertholotti, stationed at Gate 6, testified (R-355, 356) that he heard the bell and whistle of the train; saw it approaching; saw the vehicle in the west or wrong lane of the four lane road; and stepped out into the middle of the street and tried to stop the automobile (R-358). Instead, the driver swerved around him without stopping so that he had to jump out of the way to keep from being hit (R-361). He then watched it continue up onto the tracks where simultaneously it was hit by the train. There was no reason why she could neither see nor hear the approaching train.

In regard to the sign required by law to be erected by the railroad at the crossing, the evidence is clear that it was established on the right hand side of the roadway at the edge of the railroad right of way (R-304, 305, 306). The visibility of this sign is more graphically reflected by the photographic exhibits (Defendant's Exhibits 2, 3, 4, 5, 8 and 10) (R-356). Thus, the actual questions raised as to the sign were two-fold: (1) Whether the physical facts reflected by the photographs laid at rest the nebulous argument of plaintiff's counsel and witness that it could not be seen; and (2), in view of the actions of the air patrolman on duty, was the ability

to see the sign or not and the company's actions or lack of action in connection therewith an efficient proximate contributing cause of the accident? The answer to these questions is solely one involving the weight and sufficiency of the evidence which both lower courts held contra to Petitioner's position.

ARGUMENT

I. The ruling of the lower courts were correct.

It is contended by Petitioner that this being a diversity case, the trial and appellate courts applied what is referred to as the "Federal Test" rather than the "State Test" in considering the weight of the evidence. It is apparently hoped by the Petitioner, that in mentioning these two tests, this Court can be persuaded to review what is purely a question of the weight of the evidence by inferring that the issue involved is one which Mr. Chief Justice Warren found unnecessary to consider in the case of **Dick v. New York Life Insurance Company,** 359 U.S. 437, 3 L.Ed.2d 935, 79 Sup. Ct. 921. We submit that such a point is not raised by the actions of the lower courts and is not here for determination.

Petitioner implies that since there has been a showing of possible violation of state statutes, and in light of the presumption of fault raised by **§1741 of the Code of Mississippi of 1942, Recompiled** (Appendix D, page A9), it was obligatory that the trial court submit all issues of negligence to the jury. Therefore, the Court's subsequent granting of the motion for judgment notwithstanding is contrary to these requirements of state law as determined by the Supreme Court of Mississippi and is thus an application of the "Federal Test".

Carried to its logical conclusion, Petitioner's argument would mean that every issue of fact should and must be submitted to a jury. Such is not the law in the federal courts nor is it the law in the state courts of Mississippi. **Fayard v. L. & N. R. Co.,** 48 So.2d 133; **New Orleans & N. E. R. Co. v. Burney,** 159 So.2d 85; **New Orleans & N. E. R. Co. v. Burge,** 2 So.2d 825; **Thompson v. Mississippi Central R. Co.,** 166 So. 353; **Herron v. Southern Pacific Co.,** 51 Sup.Ct. 383, 75 L.Ed. 857; **Blass v. Virgin Pine Lumber Co.,** 50 F.2d 29. Mississippi recognizes the propriety of judgments notwithstanding and likewise recognizes that sometimes trial courts make

mistakes in submitting issues to juries which require the Supreme Court to reverse and render. See **Illinois Central R. Co. v. Smith, et al,** 140 So.2d 856. The cited state cases involve situations where consideration was necessarily given to the so-called "prima facie" statute of the State of Mississippi, as well as other statutes. Both state and federal courts recognize that the quantity and quality of proof are matters which the court must pass upon and that in all cases, possibilities and conjectures must be excluded from the equasion. **Braud v. Baker,** 5 Cir., 324 F.2d 213; **New Orleans & N. E. R. Co. v. Burge,** 2 So.2d 825; **2 Restatement of Torts 1163.** Indeed, in such considerations the Supreme Court of Mississippi has concurred with the opinions of the federal courts and vice versa that it is not within the legitimate province or power of the jury to convert possibility into something more by the mere force of a verdict. **Burge case supra; Teche Lines, Inc. v. Bounds,** 182 Miss. 638, 649, 179 So. 747. See also **Yazoo & M. V. R. Co. v. Lamensdorf,** 178 So. 80; and **Yazoo & M. V. R. Co. v. Green,** 147 So. 333.

Under subheading "b" entitled "Presumption of Fault", page 12 of the petition, Petitioner seeks to cite the **Brooks** case as authority that the District Judge apparently resorted to conjecture and surmise himself, ignoring the presumption created by statute, and argues that more weight should be given to §1741 than the present law permits. The actual effect of §1741, the "prima facie" statute, was laid at rest by this Honorable Court in the cases of **Mobile & J. K. C. R. Co. v. Turnipseed,** 219 U. S. 35; **Pennsylvania R. R. Co. v. Chamberlain, Admx.,** 288 U. S. 333, and **Western & A. R. Co. v. Henderson,** 279 U. S. 639. The law as laid down by these decisions have been followed by the state courts. See **Fayard v. L. & N. R. Co., supra.**

To grant certiorari in this instance would simply constitute the affording to the Petitioner a second right of appeal and nothing more. This is not a case whose decision involves principles, the application of which are

of wide public or governmental interest, which needs to be authoritatively declared by this court. The mere insistence by the Petitioner that the plaintiff below was deprived of his constitutional right to a trial by jury guaranteed by the Seventh Amendment and that both the district and appellate court refused to follow the Mississippi law as required by the decision in **Erie R. Co. v. Thompkins,** 304 U. S. 64, 82 L.Ed. 1188, 58 Sup.Ct. 817, does not make this so, and if his position were to be sustained, it would necessarily imply that every granting of a motion for judgment notwithstanding arising under diversity cases in the State of Mississippi would be sufficient considerations for writs of certiorari to this Court. Indeed, if you applied both the state and federal test to the actual issues involved in weighing the sufficiency of the evidence, you would find that they are substantially the same for neither Mississippi nor the federal decisions permit verdicts to stand which are based on mere speculation vis-a-vis probative facts. **Galloway v. United States,** 319 U. S. 372, 395, 87 L.Ed. 1458, 1473, 63 Sup.Ct. 1077; **New Orleans & N. E. R. Co., v. Burge,** 2 So.2d 825.

II. **This is not an appropriate case for Certiorari.**

The trial and appellate courts both gave due and appropriate consideration to the rules of law laid down by the state court and where this is so, the Supreme Court of the United States ordinarily accepts their determination. (See the opinions rendered in the courts below found in the petition Appendix A1 and A2). **Richards v. United States,** 369 U. S. 1, 7 L.Ed. 2d 492, 82 Sup.Ct. 585; **Appalachian Power Company, et al v. American Institute of Certified Public Accountants, et al,** 4 L.Ed. 2d 30, 80 Sup.Ct. 16. Giving full faith and credit to these statutory requirements of the Mississippi law, and the case law interpreting same, both the trial and appellate courts concluded that there was no substantial evidence of any negligence on the part of the railroad that was the proximate cause of the death in question.

As so often stated:

> "The federal court enforces the state created right by rules of procedure which it has acquired from the Federal Government and which, therefore, are not identified with those of the state courts."

Bernhardt v. Polygraphic Co., 350 U. S. 202, 100 L.Ed. 199, 76 Sup.Ct. 273. This does not "assure uniformity of judical decision . . . [or] immunity from judicial error . . ." for as stated were it otherwise every alleged misapplication of state law would constitute a federal constitutional question. **Beck v. Washington**, 369 U. S. 541, 8 L.Ed. 2d 98, 82 Sup.Ct. 955.

In the case of **Herron v. Southern Pacific Co., 283** U. S. 91, 51 Sup.Ct. 383, 75 L.Ed. 857, this Court said:

> "The function of the trial judge in a federal court is not in any sense a local matter, and state statutes that would interfere with the appropriate performance of that function are not binding on the federal court under either the 'conformity act' or 'rules of decision act'."
>
> * * * * *
>
> "The judge must exercise superintendence over the trial and is enjoined to instruct them on the law and advise them on the facts and to set aside their verdict if, in his opinion, it is against the law and the evidence."

See **Braud v. Baker**, 5 Cir., 1963, 342 F.2d 213; **Revlon, Inc. v. Buchanan**, 5 Cir., 1959, 271 F.2d 795, 800.

As noted in the trial court's opinion, the judge acknowledged that he was not free to reweigh the evidence and did not do so but within the confines of the straight jacket of both federal and state law in this type of instance, both the district and appellate courts considered

that the testimony did not fall within the statewide legal standards that the evidence was substantial and reasonably believeable. The state court laid down the similar principle thusly in **Yazoo & M. V. R. Co. v. Lamensdorf**, 178 So. 80:

> "The scintialla of evidence rule has been discarded in nearly all jurisdictions, and is not recognized in this state; but verdicts must be based upon substantial evidence and that evidence must be reasonably believeable. Whatever a jury might here or there chance to believe, we must require that the evidence upon which they act must be within statewide legal standards, and one of these, as said, is that the evidence be substantial and must be reasonably believeable."

Petitioner contends that a different rule is followed in the Fifth Circuit from that found in the Sixth and Eighth Circuits (Proposition III, page 18 of the petition). Frankly we can find no such distinction and our reading of the cited opinions leads us to the conclusion that these respective circuits are very much in accord.

This case being a matter of considering merely the weight of the evidence and its tendencies, and not one effecting other litigants or representing any major conflicts between the Federal Government and state government, it is not an appropriate case for review by this court on petition or otherwise. **Appalachian Power Co., et al v. American Institute of Certified Public Accountants, et al, supra; Richards v. United States, supra; General Box Company v. United States**, 351 U. S. 159, 100 L.Ed. 1055, 76 Sup.Ct. 728.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted,

A. F. LANKFORD, III
Counsel for Respondent
622 First National Bank Building
Mobile, Alabama

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON

and

MORSE & MORSE

CERTIFICATE OF SERVICE

I, hereby certify that I have mailed a true and correct copy of the foregoing brief for respondent to the Honorable Albert Sidney Johnston, Jr., counsel for Petitioner, by depositing same in the United States mail, postage prepaid, addressed to him at 3-5 Schwann Building, Biloxi, Mississippi, on this 29th day of January, 1965.

A. F. LANKFORD, III